

BEFORE THE
DEPARTMENT OF ENVIRONMENTAL SERVICES
WATER COUNCIL

RECEIVED

In re: Appeal of Governor's Island Club

JAN 08 2004

Docket No. 03-20 WC

OBJECTION TO NOTICE OF APPEAL AND REQUEST FOR WAIVER OF RULES,
SUBMITTED BY THE GOVERNOR'S ISLAND CLUB; AND IN THE ALTERNATIVE,
PETITION FOR INTERVENTION.

NOW COME William Jacobson, William and Virginia Scott, Richard Wholey, Isabelle Hodgson, and Edward Rabbitt, abutters to the proposed action, through counsel, to object to the "Notice of Appeal by Governor's Island Club, Inc....", and in support thereof, state the following:

Procedural Background, Parties:

1. William Jacobson owns lot 221-16, William and Virginia Scott own lot 221-12, Richard Wholey owns lot 221-13, Isabelle Hodgson owns lot 221-11, and Edward Rabbitt owns lot 221-17. Lots 221-11, 12, 13, and 16 constitute all of the properties which abut the Governor's Island Club ("GIC") parcel, Lot 221-14. Lot 221-17 is a visible abutter and so proximate as to also be directly affected by any changes to, or use of, the subject parcel.
2. The above abutters filed Objections with DES to the Governor's Island Club's ("GIC's") Request for a Variance under RSA 483-B on September 10 and October 3, 2003, and demonstrated therein their "direct interest" in the Variance request, denial, and any subsequent appeal thereof.
3. GIC admits in its "Notice..." that the DES denied its Request for a Variance on October 16, 2003. (Notice, No. 5)
4. GIC admits that its response was to file a "Motion for Reconsideration of Denial of Variance and Request for Administrative Hearing with Notice to All Abutters" on October 24, 2003. (Notice, No. 6, and attached thereto). It should be noted that copies of the Motion was **not** served on the abutters, who had no knowledge of it; the reference in the title apparently meaning that should DES grant a hearing for reconsideration, such hearing should be noticed to abutters.
5. GIC admits that it was told on December 11, 2003 that its "Motion for Reconsideration..." had not been acted on by DES, and that the proper procedure for appealing the October 16, 2003 denial of the Variance was by

appeal to the Water Council, with a motion to waive the appeal deadline. (Notice, No. 7). The result of this advise was the GIC filing of December 17, 2003, to which my clients herein object.

The Notice of Appeal should be Denied as Untimely, and for Several Procedural Inadequacies, as noted below:

6. The Notice is Untimely. GIC seeks to take advantage of the several procedural errors it has made, in order to excuse the extremely late filing of this Notice. Pursuant to Env-WC 203.02, the deadline for filing a proper Notice of Appeal to the Water Council was 30 days after the decision which is sought to be appealed. In this case, that would have been **November 15, 2003**. As the Notice was not filed until December 17, 2003, it was significantly untimely and should be denied for violation of Env-WC 203.02. See this Council's recent Decision and Order in "Appeal of Randall and Caryl Parker, Docket No. 02-14 WC.
7. The untimeliness of the Notice can not be excused because of the earlier filing of a "Motion for Reconsideration..." with DES. GIC seeks relief from the deadline set by Env-WC 203.02, by blaming the delay on DES's alleged failure to timely respond to GIC's October 24, 2003 "Motion for Reconsideration...". However, since the "Motion for Reconsideration..." was itself legally and procedurally inadequate, its filing and DES's delayed response do not toll the appeals deadline or excuse GIC from its obligation to comply with Env-WC 203.02. Env-C 206 regulates Motions for Reconsideration filed with DES. It indicates to whom the Motion must be addressed (Env-C 206.04(a)), and the form and content of the Motion (Env-C 206.05). In this case, GIC's Motion was not addressed to the proper Office, did not include the "...exact legal name of each person moving for reconsideration..." or its legal address¹, in violation of Env-C 206.05(a); nor did it contain either a "...clear and concise statement..." of the reasons the decision was in error, or a "...concise and explicit statement of the facts...". (Env-C 206.05(b), (c).) Instead, the Motion raises a constitutional claim of "due process", despite the fact that DES had acted strictly in accordance with its duly promulgated regulations, and disputes on a factual basis each of the five supplementary and legally superfluous Findings of Fact that the Commissioner appended to his denial. The Motion **did not even address, let alone identify any legal error** in the legal determinations made by the Commissioner that GIC had not met its legal burden to demonstrate how it met the five legal requirements for issuance of a variance. See page 4 of the Application and Denial, attached to GIC's Notice, and RSA 483-B:9 V(g), RSA 674:33, I(b), and

¹ The "Motion...", attached to GIC's Notice of Appeal, identifies the appellant as "Governor's Island Club", and not "Governor's Island Club, Inc.", and nowhere states its state of incorporation, or mailing address.

Env-Ws 1407.04. Absent a clear, concise, and cogent statement as to why each of those five legal determinations made by the Commissioner were wrong as a matter of law, there is no basis for appeal. (Note that the denial of the variance must be upheld if any one of the Commissioner's five determinations is upheld, as GIC had the burden to demonstrate how its proposal met all five legal requirements,

8. The Notice of Appeal to this Council is substantively and procedurally deficient: Appeals to the Water Council are regulated by Env-WC 203, and Notices of Appeal by Env-WC 203.03. The Notice of Appeal filed herein is deficient as follows: Pursuant to Env-WC 203.03(b)(1), the would-be appellant **must** include in its Notice a "...statement of... the statutory provision under which the relief is sought." The Notice filed herein nowhere identifies the statutory provision under which relief is sought. Indeed, GIC had also failed in its initial Application to identify or address the statutory provisions under which it sought the Variance. It failed to speak directly to any of the five statutory requirements for the Variance, despite the application listing each one, opting instead for generalities about the desirability of its proposed project, and ignoring the limitations imposed on the project by the Shoreland Protection Act, and the narrow circumstances under which a variance to its requirements can be granted. In its misdirected Motion for Reconsideration, it failed again to address the statutory requirements of RSA 483-B:9 V(g) and RSA 674:33, I(b), and finally in the Notice at issue herein, it again failed to identify the statutory provisions under which it seeks relief.
9. The Notice of Appeal is further deficient: The Notice is also deficient in failing to include "A concise and explicit statement of facts upon which the Council is expected to re[p]ly (sic) in granting relief," as required by Env-WC 203.03(b)(3). In order to prevail on appeal, GIC must show this Council why the Commissioner was five times wrong when he determined that GIC failed to satisfy each of the five legal requirements for the Variance. As an example, the Commissioner found that GIC had not carried its burden to demonstrate that the proposed removal of trees and vegetation, and placement of gravel within far less than 50 feet from Lake Winnepesaukee, would not be contrary to "...the spirit of the ordinance". GIC's initial application completely ignored this requirement, not even acknowledging the spirit, purpose or intent of the Comprehensive Shoreland Protection Act, RSA 483-B. (See Application). In order to satisfy Env-WC 203.03(b)(3), GIC must have included in its Notice, a "... concise and explicit statement of facts..." which will demonstrate why the Commissioner was wrong, and why GIC's initial application did demonstrate that the proposed project was consistent with the spirit of RSA 483-B. The Notice is devoid of any such facts, as well as being devoid of any appropriate legal analysis.
10. The Notice is deficient in failing to identify why the Commissioner's decision was illegal or "arbitrary and capricious". Pursuant to Env-WC 203.16(a), the would-be appellant has the burden on appeal of proving that the decision appealed from

was either illegal ("contrary to statute or rules"), or "arbitrary and capricious". Nothing in the Notice indicates what part of the Commissioner's decision below was either illegal or arbitrary and capricious, or why. The Notice merely relates the procedural history of the application, denial, attempted Motion for Reconsideration, notification that the Motion had not been accepted, and late Notice of Appeal. To this chronology, it adds two sentences that purport to be factual regarding Brook Road, which is near the area for which GIC wishes a Variance to clear vegetation and construct a graveled "turn around". There is absolutely no allegation that the decision below was illegal or arbitrary, and thus no basis for accepting the appeal. It is not sufficient to disagree with the denial.

11. The Request for Waiver of Rules is procedurally and substantively deficient: GIC combines its Notice of Appeal with a request that it be accepted despite being filed more than a month after the legal deadline. Such a request, to waive a jurisdictional, dispositive rule (which would otherwise bar the appeal), must be characterized as a Motion. Motions to this Council are regulated by Env-WC 203.21. Pursuant to that provision, the Motion must contain a clear and concise statement of the facts and law which support the motion, and all parties who would be adversely affected by the ruling sought by the motion shall have the opportunity to respond to the motion. The persons filing this Objection, as abutters and participants in the Variance process below, are parties who would be adversely affected by the ruling sought on this motion, See definition of "party" at Env-WC 201.03(f). Therefore GIC had an obligation under these rules to provide the abutters with a copy of its mis-named "Request for Waiver of Rules.", in order to allow an "opportunity to respond." GIC did **not** provide the abutters, or undersigned counsel, with a copy of its Notice and Request, and thus its pleading is in violation of Env-WC 203.21. It is only through its own efforts and diligence that abutters became aware of this Notice and mis-named motion, and the fact that abutters have managed to learn of this filing and respond does not negate GIC's failure to provide notice and the opportunity to respond.
12. The Notice of Appeal should be Rejected by this Council. In its recent Decision and Order in "*Appeal of Randall and Caryl Parker*, Docket No. 02-14 WC, this Council quite properly upheld the importance of its Procedural Rules. It gave a would be appellant 30 extra days to comply, and when the would-be appellant failed to meet that new deadline, the appeal was dismissed. In this case, GIC has clearly read the Procedural Rules, has apparently met the minimum procedural requirements such as number of copies, but instead has failed to state a valid case for appeal. Failure to clearly identify the relevant law (§203.03(b)(1)), to state the facts upon which the Council must rely in order to grant relief (§203.03(b)(3)), or to even allege how the decision below is contrary to statute or rules, or arbitrary and capricious (§203.16(a)(1), (2)), are substantive flaws that demand rejection of the appeal. In addition, missing the deadline by more than a month is jurisdictional, and waiver of this deadline

prejudices my clients.

13. GIC's request for a Hearing at which it asks to introduce "evidence to support the granting of a variance" is improper and contrary to the rules. GIC's request for a hearing de novo before the Council at which it hopes to introduce evidence relevant to the granting of a variance (see Notice, Prayer for Relief, para. D), demonstrates its failure to comprehend the nature of its right of appeal. This Council can not grant such an evidentiary hearing, and can not order the grant of a variance. It can only hear evidence that is "relevant and material" to the hearing (Env-WC 203.20(b)), which can only determine if the decision made on October 16, 2003 by the DES Commissioner, on the basis of the record then before him, was either illegal or arbitrary or capricious, or not. Env-WC 203.16(a). That GIC might have introduced other evidence or otherwise argued for a variance prior to October 16, 2003 is clearly irrelevant and inadmissible.

WHEREFORE, the objectors named below respectfully prays that this Council:

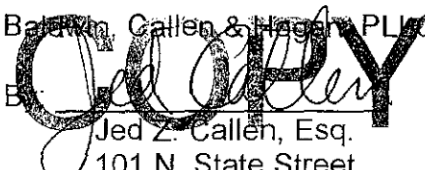
- A. Deny the GIC's Request for Waiver of Rules, as procedurally deficient; and
- B. Reject the GIC's Notice as untimely; and
- C. Reject the GIC's Notice as substantively deficient for failure to state legal and factual grounds for an appeal; and
- D. Reject the GIC's Notice as procedurally deficient; or
- E. Grant this Petition under RSA 541-A:32 and Env-WC 12 for Intervenor status, should this Council not reject the Notice of Appeal.

Respectfully Submitted,

William Jacobson, William and Virginia
Scott, Richard Wholey, Isabelle
Hodgson, and Edward Rabbitt


By their Attorney:

Date: Jan. 8, 2004

Bateman, Callen & Haggan, PLLC

Jed Z. Callen, Esq.
101 N. State Street
Concord, NH 03301

CERTIFICATION

The Original and 20 copies of this Objection have been this day filed with the Council pursuant to Env-WC 202.03; copies have also been sent first class mail to the Commissioner of DES, the Director of the Water Division, and to Philip A. Brouillard, Esq., counsel for GIC.

COPY

Jed Z. Callen, Esq.